SUPREME COURT, U.S.
FILED
MAY 5 1993
OFFICE OF THE CLERK

No. 92-1454

In the Supreme Court of the United States

OCTOBER TERM, 1992

N.A. WALDROP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
DOUGLAS N. LETTER
JEFFREY B. CHASNOW
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an indictment charging petitioner with conspiracy and with aiding and abetting related substantive offenses was timely brought when overt acts in furtherance of the conspiracy, as well as the substantive offenses, occurred within five years prior to the date of the indictment.

2. Whether petitioner, having entered a conditional plea of guilty that reserved only one issue for appeal, is foreclosed from challenging his conviction on other grounds.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Barker v. *Wingo*, 407 U.S. 514 (1972)	8
Burkett v. *Fulcomer*, 951 F.2d 1431 (3d Cir. 1991), cert. denied, 112 S. Ct. 3055 (1992)	9
Cox v. *Lockhart*, 970 F.2d 448 (8th Cir. 1992)	8
Doggett v. *United States*, 112 S. Ct. 2686 (1992)	7, 8
Hyde v. *United States*, 225 U.S. 347 (1912)	5
Martin v. *Ohio*, 480 U.S. 228 (1987)	5
Medina v. *California*, 112 S. Ct. 2572 (1992)	5
Murray v. *Carrier*, 477 U.S. 478 (1986)	9
Payne v. *United States*, 113 S. Ct. 811 (1992)	6
Pharm v. *Hatcher*, 984 F.2d 783 (7th Cir. 1993)	9
Schmuck v. *United States*, 489 U.S. 705 (1989)	5, 7
United States v. *Anagnostou*, 974 F.2d 939 (7th Cir. (1992)	9
United States v. *Bell*, 966 F.2d 914 (5th Cir. 1992)	7
United States v. *Broce*, 488 U.S. 563 (1989)	7
United States v. *Locklear*, 829 F.2d 1314 (4th Cir. 1987)	7
United States v. *MacDonald*, 456 U.S. 1 (1982)	2, 8
United States v. *Maze*, 414 U.S. 395 (1974)	7
United States v. *O'Donnell*, 539 F.2d 1233 (9th Cir.), cert. denied, 429 U.S. 960 (1976)	8
United States v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973)	7

Cases—Continued: Page

United States v. *Ramos*, 961 F.2d 1003 (1st Cir.), cert. denied, 113 S. Ct. 364 (1992) 7
United States v. *Read*, 658 F.2d 1225 (7th Cir. 1981) ... 5
United States v. *Williams*, 112 S. Ct. 1735 (1992) 6
Varah v. *United States*, 113 S. Ct. 1045 (1993) 6

Constitution, statutes and rule:

U.S. Const.:
Amend. V (Due Process Clause) 2, 5
Amend. VI (Speedy Trial Clause) 2, 8
15 U.S.C. 1988 (1988 & Supp. III 1991) 2
15 U.S.C. 1990c 2
18 U.S.C. 371 2
18 U.S.C. 513 (1988 & Supp. III 1991) 2
18 U.S.C. 1341 (1988 & Supp. III 1991) 2
Fed. R. Crim. P. 11(a)(2) 4

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1454

N.A. WALDROP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unpublished, but the judgment is noted at 983 F.2d 1054 (Table). The opinion of the district court (Pet. App. 9-25) is reported at 786 F. Supp. 1194.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1992. A petition for rehearing was denied on January 14, 1993. Pet. App. 43. The petition for a writ of certiorari was filed on March 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement, petitioner entered a conditional guilty plea in the United States District Court for the Middle District of Pennsylvania to one count of conspiracy, in violation of 18 U.S.C. 371; one count of possessing counterfeit or forged securities, in violation of 18 U.S.C. 513 (1988 & Supp. III 1991); one count of mail fraud, in violation of 18 U.S.C. 1341 (1988 & Supp. III 1991); and one count of violating federal requirements relating to the certification of odometer readings, in violation of 15 U.S.C. 1988 (1988 & Supp. III 1991) and 1990c. Petitioner reserved the right to appeal the district court's conclusion that petitioner's indictment was not barred by the statute of limitations. The court of appeals affirmed. Pet. App. 1-7.

1. On April 30, 1991, petitioner was indicted for various offenses relating to his involvement in an illegal odometer tampering scheme. A superseding indictment, returned on August 6, 1991, added further charges arising from the same scheme. Pet. App. 1-2, 16. Petitioner moved to dismiss the indictment on the ground that the charges were barred by the five-year statute of limitation and on the alternative ground that the pre-indictment delay violated his due process rights.[1] *Id.* at 9-10. Both claims were submitted on the basis of the factual allegations in the superseding indictment and on a stipulation of facts entered into by the parties. *Id.* at 2, 10, 17.

---

[1] Petitioner incorrectly asserts, Pet. 8, 23, that he sought dismissal in the district court under the Sixth Amendment's Speedy Trial Clause. Petitioner's "Motion To Dismiss For Violation Of The Defendant's Fifth Amendment Right To Due Process Of Law" addressed only pre-indictment delay, and thus was grounded on the Due Process Clause, not the Speedy Trial Clause. See *United States* v. *MacDonald*, 456 U.S. 1, 7 (1982).

The facts alleged and stipulated were that petitioner purchased late-model, high-mileage used automobiles for resale through his South Carolina automobile wholesale business. A co-defendant, mechanic Wayne Sexton, altered the cars' odometers to show lower mileage readings, and petitioner then sold the cars to a Pennsylvania wholesaler, co-defendant Lawrence Walsh. In Pennsylvania, Walsh would obtain new titles reflecting the altered odometer readings and would then sell the cars to unsuspecting retailers. To help conceal his relationship with Walsh, petitioner first sold the "clocked" cars to another South Carolina dealer, co-defendant Sammy Little, who then completed the sales to Walsh.[2] Pet. App. 2-3, 10-12. Petitioner ceased selling clocked cars to Walsh in 1985, after Pennsylvania officials detected alterations in some titles Walsh had submitted for retitling. However, Walsh continued reselling clocked cars he had obtained from petitioner until September 1986; the superseding indictment alleged that Walsh committed four overt acts in furtherance of the original conspiracy after April 30, 1986. Petitioner did nothing to frustrate the consummation of the scheme. *Id.* at 3, 13-14.

The district court denied petitioner's pretrial motions. Pet. App. 8-25. The court ruled that it would be inappropriate to dismiss the conspiracy charge before trial because, based on the facts pleaded and stipulated, "a jury could reasonably find that the government had not violated the statute of limitations." *Id.* at 20. Specifically, the court rejected petitioner's contention that his co-conspirators' withdrawal had terminated the

[2] Title transfer documents for sales from petitioner to Little bore the correct mileages of the cars sold, while documents evidencing sales from Little to Walsh bore the altered mileages. Thus, Little functioned as the "straw" in the scheme. Pet. App. 11.

conspiracy prior to April 30, 1986, the statute of limitations cut-off date: "The court cannot determine, as a matter of law, that defendants Little, Sexton and Walsh effectuated a withdrawal from the conspiracy from the facts presently before it." *Ibid.* The court also upheld the substantive counts of the indictment, *id.* at 22-25, and rejected petitioner's claim of prejudicial pre-indictment delay. *Id.* at 10 n.3.

2. Following the district court's ruling, petitioner signed a plea agreement with the government, in accordance with which he later entered a conditional plea of guilty pursuant to Fed. R. Crim. P. 11(a)(2). The agreement reserved to petitioner the right to appeal the district court's ruling "denying [his] motion to dismiss the indictment on the ground that the offenses charged in it were barred by the applicable statute of limitations, 18 U.S.C. § 3282." C.A. App. 20. Petitioner reserved no other issue for appeal. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-7. The court found it "particularly significant that Walsh's illegal activities continued well past April 30, 1986," and therefore concluded that "there was no record basis to find that the conspiracy ended before the statute of limitations ran." *Id.* at 5. The court explained that "by pretermitting proceedings and pleading guilty, [petitioner] ha[d] given up his opportunity to raise the withdrawal issue as a fact matter before the jury. Thus, he [was] limited to showing withdrawal as a matter of law, and this he * * * failed to do." *Ibid.* The court next ruled that petitioner's substantive offenses were properly pleaded within the limitations period. *Id.* at 5-7. Finally, the court of appeals rejected petitioner's claim that the mailings supporting his mail fraud conviction were not in furtherance of the scheme to defraud, noting that that issue had "not been preserved for appeal" and that it was in any event meritless under this Court's

decision in *Schmuck* v. *United States*, 489 U.S. 705 (1989). Pet. App. 6 n.1.

ARGUMENT

1. Petitioner first contends that this Court should grant review to resolve a conflict among the courts of appeals respecting the assignment of the burden of proof when a defendant seeks to show his withdrawal from a criminal conspiracy. Petitioner correctly notes that in *United States* v. *Read*, 658 F.2d 1225 (1981), the Seventh Circuit concluded—disagreeing with all other circuits to consider the issue, as well as with the allocation of burdens outlined by this Court's decision in *Hyde* v. *United States*, 225 U.S. 347 (1912)—that placing on the defendant the burden of proving an affirmative defense such as withdrawal from a conspiracy would violate due process.

The conflict petitioner identifies, however, does not support plenary review in this case for two reasons. First, since the Seventh Circuit's decision in *Read*, this Court has decided cases undermining *Read*'s suggestion that the Due Process Clause forbids placing the burden of proving withdrawal on a defendant. For example, in *Martin* v. *Ohio*, 480 U.S. 228 (1987), this Court held that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense. And in *Medina* v. *California*, 112 S. Ct. 2572 (1992), the Court ruled that a State may constitutionally require the defendant to bear the burden of proving incompetence. As with those other defenses, requiring a defendant to establish withdrawal does not "offend[] [any] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 2577. During the current Term alone, the Court has twice denied certiorari in cases raising the withdrawal issue on which petitioner seeks review, see

Varah v. *United States*, 113 S. Ct. 1045 (1993); *Payne* v. *United States*, 113 S. Ct. 811 (1992), and there is no reason for the Court to treat this case differently. Second, this case does not properly present the issue on which the courts of appeals are divided. Because petitioner pleaded guilty before trial, he reserved only the question whether his indictment was untimely as a matter of law. In finding that the stipulated facts *could* support a jury finding that the indictment was timely, it was unnecessary for the court of appeals to decide who would have borne the risk of nonpersuasion if the case had proceeded to trial.[3]

2. There is no greater merit to petitioner's related argument that the government should be estopped from prosecuting him as a consequence of having proposed an agreement tolling the statute of limitations, which petitioner rejected. Pet. 17-18. Because it was "not pressed or passed upon below," this issue is not properly before this Court. *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992). In any event, the proposed tolling agreement (Pet. App. 37-38) merely attempted to forestall subsequent litigation about the scope and duration of petitioner's scheme. It did not concede that the statute of limitations had expired and did not otherwise assure petitioner that he would be successful in any

[3] Petitioner's challenge to the substantive offenses to which he pleaded guilty fails to the extent it is based on the same withdrawal theory on which he challenges his conspiracy conviction. See Pet. 18. In any event, petitioner's arguments do not warrant review. Whether petitioner aided and abetted Walsh's sales of clocked cars after April 30, 1986, Pet. 19, or whether Walsh's actions were reasonably foreseeable in the context of the odometer fraud scheme in which petitioner and Walsh were engaged, Pet. 20, are factual matters that petitioner chose not to pursue at a trial. In challenging his substantive convictions, petitioner presents no significant legal issue that warrants this Court's attention.

litigation raising the limitations issue. Moreover, the proposed agreement cannot support an estoppel defense in any event, as there is no definitive statement in the proposal upon which petitioner can claim to have relied to his detriment. See *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674-675 (1973).

3. Petitioner's remaining arguments, based on *United States* v. *Maze*, 414 U.S. 395 (1974), and *Doggett* v. *United States*, 112 S. Ct. 2686 (1992), are foreclosed by his guilty plea. As the court of appeals observed, petitioner's challenge to his mail fraud conviction based on *Maze* was not preserved for appeal when petitioner entered his conditional guilty plea. Pet. App. 6 n.1. Thus, petitioner is foreclosed from pursuing the challenge. See *United States* v. *Broce*, 488 U.S. 563 (1989). See also *United States* v. *Bell*, 966 F.2d 914, 915-916 (5th Cir. 1992); *United States* v. *Ramos*, 961 F.2d 1003, 1005-1006 (1st Cir.), cert. denied, 113 S. Ct. 364 (1992). In any event, even if not foreclosed, petitioner's argument would not merit this Court's attention. As the court of appeals observed, Pet. App. 6 n.1, this Court's opinion in *Schmuck* v. *United States*, 489 U.S. 705 (1989), defeats petitioner's attempt to redefine his mail fraud scheme. Addressing an odometer-tampering scheme very similar to petitioner's, *Schmuck* held that title-registration mailings satisfy the mailing element of a mail fraud offense. Petitioner attempts to distinguish *Schmuck* factually as involving a tampering scheme with "fewer steps and fewer persons." Pet. 21. Both lower courts in this case correctly rejected that distinction, noting that whatever the number of players in the scheme, the scheme depended, as it did in *Schmuck*, on "successful passage of title." Pet. App. 6 n.1 & 24 (quoting *Schmuck*, 489 U.S. at 712). See also *United States* v. *Locklear*, 829 F.2d 1314 (4th Cir. 1987), cited approvingly in *Schmuck*, 489 U.S. at 712, where the

number of steps and persons in the scheme were the same as in this case.

Petitioner's guilty plea similarly forecloses his claim based on *Doggett*. See, *e.g.*, *Cox* v. *Lockhart*, 970 F.2d 448, 453 (8th Cir. 1992); *United States* v. *O'Donnell*, 539 F.2d 1233, 1237 (9th Cir.), cert. denied, 429 U.S. 960 (1976). Indeed, petitioner failed even to raise a Sixth Amendment claim in the district court or the court of appeals.[4] In any event, *Doggett* is inapplicable to petitioner's challenge. Whereas *Doggett* addressed speedy trial rights implicated by delay "between accusation and trial," 112 S. Ct. at 2690, petitioner is complaining only about delay that occurred before charges were brought. As this Court has clearly stated, petitioner's claim "must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." *United States* v. *MacDonald*, 456 U.S. 1, 7 (1982). Because *Doggett* did not address the due process inquiry, it did not, as petitioner suggests, Pet. 25, alter the actual prejudice requirement for cases of pre-indictment delay.[5] See

---

[4] Following the court of appeals' decision, petitioner filed a petition for writ of error *coram nōbis* in the district court, raising the same argument based on *Doggett* that he raises here. On March 30, 1993, the district court rejected that petition, ruling that the claim under *Doggett* "was waived when [petitioner] entered his guilty plea," and that *Doggett* "did not, as the defendant contends, reject the due process pre-indictment delay rationale of *United States v. Marion*, [404 U.S. 307 (1971)], which requires a finding by the court that the Government intentionally delayed seeking the indictment in order to gain a tactical advantage and that the intentional delay caused actual prejudice to the defendant." Mar. 30, 1993 Order 2, 3.

[5] Nor for that matter did *Doggett* change the prejudice standard applicable to speedy trial claims. The Court explained its presumptive prejudice principle as simply an explication of well-settled precedent. See *Doggett*, 112 S. Ct. at 2690 (citing *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972)). That principle was available to

Pharm v. *Hatcher*, 984 F.2d 783, 786 n.5 (7th Cir. 1993); *United States* v. *Anagnostou*, 974 F.2d 939, 941-942 (7th Cir. 1992). Thus, even if he had properly preserved the issue, petitioner has failed to present a cognizable claim under *Doggett*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DOUGLAS N. LETTER
JEFFREY B. CHASNOW
Attorneys

MAY 1993

---

petitioner when he pleaded guilty in December 1991. See *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1442 n.13 (3d Cir. 1991) (describing issue presented in *Doggett*), cert. denied, 112 S. Ct. 3055 (1992). Thus, even if *Doggett* were applied as broadly as petitioner would like, petitioner's failure to pursue the prejudice issue in the court of appeals forecloses his present challenge. Cf. *Murray* v. *Carrier*, 477 U.S. 478, 486-487 (1986).